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KWONG YIK BANK BHD

v.

KWAN CHEW HOLDINGS SDN BHD

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COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
MOHD NOOR AHMAD JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: W-02-716-1996]

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24 JULY 2009

CIVIL PROCEDURE: *Action - Limitation - Issue of - Application to recover outstanding overdraft due - Accrual of cause of action - Limitation Act 1953, s. 26(2) - Whether applicable - Whether action statute barred by virtue of s. 6(1)(a) Limitation Act 1953*

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CIVIL PROCEDURE: *Preliminary question - Rules of the High Court 1980, O. 33 - Limitation - Issue of - Application to recover outstanding overdraft due - Whether action statute barred by virtue of s. 6(1)(a) Limitation Act 1953 - Whether Judicial Commissioner correct in dismissing appellant's claim*

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The appellant, on 28 December 1983, had given overdraft facilities of RM250,000 to the respondent to finance its housing project ('the housing project'). Subsequently, the respondent defaulted in

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the repayment of the overdraft facility. The appellant then filed the present suit in the High Court on 5 April 1996 to recover, *inter alia*, the outstanding overdraft of RM1,982,816.83 which was due on 29 February 1996. On 16 September 1996, the respondent applied for an order pursuant to O. 33 r. 2 of the Rules of the

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High Court 1980 ('RHC') for the preliminary question of the issue of limitation of action of the appellant's claim to be set down for hearing and disposed before the trial of the other questions or issues in the action. On 15 November 1996, the Judicial Commissioner heard the application under O. 33 RHC and held

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that the appellant/plaintiff's claim was statute barred and accordingly dismissed the appellant's claim with costs. Hence, this appeal by the plaintiff/appellant. The issues to be determined were (i) whether the Judicial Commissioner was correct in dismissing the appellant's claim pursuant to O. 33 r. 5 of the Rules of the High

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Court 1980 and (ii) whether the plaintiff's action was statute barred.

Held (dismissing the appeal with costs)
Per Hashim Yusoff JCA delivering the judgment of the court:

(1) The learned Judicial Commissioner's order dated 15 September 1996 on the application made by the respondent had indicated that his Lordship had read the respective affidavits on behalf of the respondent as well as the affidavits on behalf of the appellant together with the pleadings filed therein and heard submission from respective counsel from both parties. His Lordship decided that the issue of limitation raised by the respondent be heard pursuant to O. 33 r. 2 RHC 1980. It was only after hearing the said issue that the Judicial Commissioner made the order dismissing the appellant/plaintiff's claim against the respondent/defendant. The Judicial Commissioner had correctly decided the O. 33 r. 2 RHC 1980 application when his Lordship made the order of dismissing the appellant's claim pursuant to O. 33 r. 5. (paras 11-13)

(2) The appellant's argument was premised on the ground that their fifth letter of offer dated 19 April 1990 was duly accepted and acknowledged by the respondent/ defendant on 18 May 1990 and that the respondent's acknowledgment of the said letter thereby estopped it from raising the issue of limitation. However, based on the case of *Wee Tiang Teng*, there was no evidence of any unequivocal admission of a subsisting debt by the respondent at the time of its acknowledgment. Therefore, the appellant/plaintiff's contention that the said letter constituted an acknowledgment of the outstanding debt by the respondent failed. (paras 14 & 18)

(3) The appellant had given overdraft facilities to the respondent by letter dated 28 December 1983. The overdraft became due and payable at the time each loan was made. Herein, the respondent's overdraft therefore became due since 28 December 1983. This was further substantiated by the appellant's letter dated 6 February 1985 requesting the respondent to regularise its account failing which the appellants would have no alternative but to institute legal proceedings against the respondent to recover the whole outstanding balance. The appellant's cause of action thus arose since then. Section 26(2) of the Limitation Act 1953 did not apply in this case since there was no acknowledgment of the claim or any payment made in respect thereof by the

respondent. By filing their claim only on 5 April 1996, the appellant's action was already statute barred by virtue of s. 6(1)(a) of the Limitation Act 1953. (paras 21-23)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, pada 28 Disember 1983, telah memberi kemudahan overderaf RM250,000 kepada responden untuk pembiayaan projek perumahan ('projek perumahan'). Seterusnya, responden gagal membayar balik kemudahan overderaf. Perayu memfailkan tindakan di Mahkamah Tinggi pada 5 April 1996 untuk mendapatkan, antara lain, hutang overderaf RM1,982,816.83, yang perlu dibayar pada 29 Februari 1996. Pada 16 September 1996, responden memohon untuk perintah di bawah A. 33 k. 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bagi persoalan awal mengenai isu had masa tindakan permohonan perayu untuk dibicarakan dan diputuskan sebelum perbicaraan mengenai persoalan-persoalan atau isu-isu lain di dalam tindakan. Pada 15 November 1996, pesuruhjaya kehakiman telah membicarakan permohonan di bawah A. 33 KMT dan memutuskan bahawa permohonan perayu/plaintif dihalang oleh statut dan menolak permohonan perayu dengan kos. Oleh itu, rayuan ini oleh plaintif/perayu. Isu-isu yang perlu ditentukan adalah (i) sama ada Pesuruhjaya Kehakiman betul apabila menolak permohonan perayu mengikut A. 33 k. 5 Kaedah-Kaedah Mahkamah Tinggi 1980 dan (ii) sama ada tindakan plaintif dilarang oleh statut.

Diputuskan (menolak rayuan dengan kos)
Oleh Hashim Yusoff HMR menyampaikan penghakiman mahkamah:

(1) Perintah bertarikh 15 September 1996 Pesuruhjaya Kehakiman mengenai permohonan oleh responden telah menunjukkan bahawa beliau telah membaca afidavit-afidavit masing-masing bagi pihak responden dan juga afidavit-afidavit bagi pihak perayu bersama-sama dengan pliding yang difailkan dan mendengar hujahan-hujahan dari peguam-peguam kedua-dua pihak. Pesuruhjaya Kehakiman telah memutuskan bahawa isu had masa yang dibangkitkan oleh responden dibicarakan mengikut A. 33 k. 2 KMT 1980. Ia hanya selepas perbicaraan isu tersebut yang Pesuruhjaya Kehakiman membuat perintah menolak permohonan perayu/plaintif terhadap responden/defendan. Pesuruhjaya Kehakiman telah dengan betul memutuskan permohonan A. 33 k. 2 KMT apabila beliau membuat perintah menolak permohonan perayu di bawah A. 33 k. 5.

(2) Hujahan perayu adalah atas alasan bahawa surat tawaran kelima bertarikh 19 April 1990 telah diterima dan diakui oleh responden/defendan pada 18 Mei 1990 dan bahawa akuan penerimaan surat itu oleh responden telah mengestopkan responden daripada membangkitkan isu had masa. Tetapi, berdasarkan kes *Wee Tiang Teng*, tidak terdapat keterangan pengakuan jelas dan nyata mengenai hutang yang masih hidup oleh responden pada masa penerimaannya. Oleh itu, hujahan perayu/plaintif bahawa surat tersebut berjumlah kepada perakuan hutang yang masih belum dibayar oleh responden gagal.

(3) Perayu telah memberi kemudahan overderaf kepada responden melalui surat bertarikh 28 Disember 1983. Kemudahan overderaf perlu dibayar pada masa setiap pinjaman dibuat. Di sini, overderaf responden menjadi kena bayar sejak 28 Disember 1983. Ini seterusnya dibuktikan oleh surat perayu bertarikh 6 Februari 1985 meminta responden mengesahkan akaunnya dan jika gagal berbuat sedemikian perayu tidak mempunyai alternatif lain tetapi untuk memulakan prosiding undang-undang terhadap responden untuk mendapatkan balik jumlah hutang keseluruhan. Kausa tindakan perayu berbangkit dari masa itu. Seksyen 26(2) Akta Had Masa 1953 tidak boleh digunapakai di sini kerana tidak terdapat perakuan tuntutan atau apa-apa bayaran yang dibuat oleh respondent. Dengan memfailkan tuntutan hanya pada 5 April 1996, tindakan perayu dilarang oleh statut mengikut s. 6(1)(a) Akta Had Masa 1953.

Case(s) referred to:

Bian Chiang Bank Bhd v. Kwong Hing Cheong [1978] 1 LNS 17 HC ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 MLJ 474 ***(refd)***

SI Rajah & Anor v. Dato' Mak Hon Kam & Ors (No 1) [1994] 1 CLJ 207 HC ***(refd)***

Wee Tiang Teng v. Ong Chong Hooi & Anor [1978] 1 LNS 234 FC ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 6(1)(a), 26(2)

Rules of the High Court 1980, O. 33 rr. 2, 5

For the appellant - Leong Wai Hong (Lim Koon Huan with him); M/s Skrine
For the respondent - Ramdas Tikamdas; M/s Siva, Ram & Assocs

[Appeal from High Court, Kuala Lumpur; Suit No: D5-22-245-1996]

[Editor's note: For the High Court judgment, please see Kwong Yik Bank Bhd v. Kwan Chew Holdings Sdn Bhd [1997] 1 LNS 121.]

Reported by Suhainah Wahiduddin

JUDGMENT

Hashim Yusoff JCA:

[1] This is an appeal against the decision of the High Court which had dismissed the appellant/plaintiff's claim against the respondent/defendant. After hearing submission from both parties we unanimously dismissed the appeal. We now give our reasons for doing so.

Background Facts

[2] On 28 December 1983 the appellant had given overdraft facilities of RM250,000 to the respondent to finance its housing project in Taman Dangi, Kuala Pilah (the "said housing project"). Subsequently the respondent defaulted in the repayment of the overdraft facility. The appellant then filed the present suit in the High court on 5 April 1996 to recover, *inter alia*, the outstanding overdraft of RM1,982,816.83 which was due at 29 February 1996.

[3] On 16 September 1996 the respondent applied for an order pursuant to O. 33 r. 2 of the Rules of the High Court 1980 ("RHC") for the preliminary question on the issue of limitation of action of the appellant's claim, to be set down for hearing and disposed before the trial of the other questions or issues in the action. The respondent further prayed for directions to be given as to the hearing of the preliminary issue.

[4] On 15 November 1996 the learned judicial commissioner heard the application under O. 33 RHC and held that the appellant/plaintiff's claim was statute barred and accordingly dismissed the appellant's claim with costs. Hence this appeal by the plaintiff/appellant to this court.

[5] There were only two issues to be determined in this appeal ie:

(i) Was the plaintiff's action statute barred? A

(ii) Was the learned judicial commissioner correct in dismissing the appellant's claim pursuant to O. 33 r. 5 of the RHC?

[6] Learned counsel for the appellant submitted that the learned judicial commissioner had exceeded his jurisdiction by dismissing the plaintiff's claim because the issues were not formulated yet. The respondent/defendant had made an application for an order pursuant to O. 33 r. 2 Rules of the High Court (RHC) 1980, that the preliminary issue or question of limitation of the action be set down for hearing and for direction to be given as to the hearing of the matter. It would be only after the learned judicial commissioner agreed to hear the preliminary issue and gave such directions should he then hear the merits of the preliminary issue. However it was submitted that the learned judicial commissioner had exceeded his jurisdiction by summarily dismissing the appellant's/plaintiff's claim, without formulating the question. B C D

[7] Reference was made to the case of *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 MLJ 474 where the appellant had applied to dismiss the respondent's action against them on two grounds: "(a) ... (b) that the respondent had not referred the dispute between the parties to arbitration. The application was dismissed in the High Court." The Supreme Court held: E

> (1) There were several issues in this case which must be proved by extrinsic evidence. As such, these are matters that ought to be tried at the trial proper and they cannot be decided by recourse to O. 33 r. 2 read together with O. 18 r. 11 of the Rules of the High Court 1980. F

[8] Further, Jemuri Serjan CJ (Borneo) at p. 475 para H (right) said: G

> If learned counsel for the appellant relied on O. 33 r. 2, in the first place, there should be an application for an Order under r. 2 and if the court allows the application, then the court may give direction as to the manner in which the question or issue shall be stated. H

[9] Learned counsel for the respondent however submitted that the learned judicial commissioner had considered the issue of limitation raised by the respondent and went into the merits before making the order that the appellant/plaintiff's claim against the I

respondent be dismissed with costs pursuant to O. 33 r. 2 of the RHC 1980. Reference was made to the Appeal Record at p. 227 paras. 4, 5, 7 and 8 whereby the issues regarding the first notice of demand and whether there was a revival of the cause of action were considered by the learned judicial commissioner. In fact the appellant's counsel had even submitted on the merits (see Appeal Record pp. 161, 165 - 166) upon the issue of limitation which was found in the pleadings.

[10] Learned counsel for the appellant further submitted that the application before the learned judicial commissioner was for leave to frame the issues to be tried. And since the learned judicial commissioner did not do so, his Lordship therefore had exceeded his jurisdiction. He cited the case of *S.I. Rajah & Anor v. Dato' Mak Hon Kam & Ors (No 1)* [1994] 1 CLJ 207, wherein the learned High Court judge had framed the question to be dealt with before deciding to hear it pursuant to O. 33 r. 2 of the RHC 1980.

Court Findings

[11] Order 33 r. 2 of the RHC 1980 provides:

> 2. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[12] Looking at the Supplementary Appeal Record (pp. 1 - 2) we found that the learned judicial commissioner's order dated 15 September 1996 on the application made by the respondent had indicated that his Lordship had read the respective affidavits on behalf of the respondent as well as the affidavits on behalf of the appellant together with the pleadings filed therein and heard submission from respective counsel from both parties, his Lordship decided that the issue of limitation raised by the respondent be heard pursuant to O. 33 r. 2 RHC 1980. It was only after hearing the said issue that the learned judicial commissioner made the order dismissing the appellant/plaintiff's claim against the respondent/defendant.

[13] For the above reasons, we found that the learned judicial commissioner had correctly decided the O. 33 r. 2 RHC 1980 application when his Lordship made the order of dismissing the appellant's claim pursuant to O. 33 r. 5 which states:

> 5. If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposed of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

On The Issue Of Limitation

[14] The appellant's argument is premised on the ground that their fifth letter of offer dated 19 April 1990 (exh. "A-7" - see Appeal Record vol. 2 p. 271) was duly accepted and acknowledged by the respondent/defendant on 18 May 1990. Such acceptance by the respondent meant that the respondent acknowledged the outstanding debt due to the appellant/plaintiff. It was also submitted by learned counsel for the appellant that the respondent's acknowledgement of the said fifth letter of offer thereby estopped it from raising the issue of limitation.

[15] In reply the learned counsel for the respondent submitted that even if the respondent's acceptance of the RM2,000 on 8 December 1989 is taken into account, the appellant's claim would still be statute barred as more than six years had lapsed give that date and the filing of the writ on 5 April 1996. He further argued that the fifth letter of offer dated 19 April 1990 (exh. "A7") was only a conditional proposal by the appellant which never took effect and that it was not an acknowledgement of the plaintiff's claim pursuant to s. 26(2) of the Limitation Act 1953.

Court's Finding

[16] In the case of *Wee Tiang Teng v. Ong Chong Hooi & Anor* [1978] 1 LNS 234, the appellant claimed the benefits due under a staff provident fund. He had admitted being guilty of misconduct as a manager of the bank and had been allowed to retire in April 1967. His benefits under the Staff Provident Fund Scheme were withheld pending settlement of possible claims. The action in this case was brought on 13 August 1974 and the defendants-respondents argued that it was time-barred. The

A appellant argued that he had received a letter dated 24 June 1971 from the bank which stated in effect that his benefits would be withheld until outstanding claims on overdrafts were settled. The plaintiff-appellant's claimed that this letter was an acknowledgement. The appellant's claim was dismissed and he appealed to the B Federal Court.

Held, dismissing the appeal: the letter in question was not a sufficient acknowledgement. By it the defendants acknowledged that a claim had been made against them, they did not acknowledge that they were indebted to the plaintiff and even if it C was an acknowledgement the debt acknowledged was not quantified in figures nor was it capable of ascertainment by calculation or by extrinsic evidence without further agreement of the parties. To take a demand out of the statute of limitation on the ground of acknowledgement, the language of the debtor must D amount to an unequivocal admission of a subsisting debt, that is, subsisting at the time of its acknowledgement.

[17] In the instant appeal the fifth letter of offer dated 19 April 1990 (exh. A7) reads as follows:

E Our Ref: TSG/TKK/lmc

19th April 1990

Kwan Chew Holdings Sdn Bhd
Lot 8.15 Sun Complex
F Jalan Bukit Bintang
Kuala Lumpur

Dear Sir

Taman Dangi Project

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We are please to announce that our management has agreed to the following mode of release of the additional bridging finance of $45,000 to secure Certificate of Fitness for Occupation:

a. An initial $2,000 had been released to you on 8-12-1989.

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b. The balance of $43,000 is to be released direct to your supplier/contractor/labourers

i. for first release as and when building materials are ordered and delivered;

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ii. subsequent releases as and when building materials are ordered and delivered plus on-site verification of work done.

The above is conditional on your doing the following:-

i. A Power Attorney given to the bank/its agent to firstly sell the presently unsold units and secondly to appoint an independent contractor(s) to finish the project if work is unsatisfactory or stopped whatsoever.

ii. An undertaking by you to forward to us the following:

a. the unfinanced portion of each new purchaser;

b. the initial 10% of the purchase price of units to be sold.

The above (i) and (ii) is subject to the approval of your Board of Directors with the proper Board resolution passed.

Kindly note the following information relevant to you:

a. The redemption sum of each title is now the sale and purchase price of the relevant housing unit.

b. The setting aside of 15% of all proceeds to pay your unsecured creditors as agreed in our letter of November 5, 1987 remains in force. However, you are to endeavour to negotiate with each of the unsecured creditor for a discount.

Kindly sign on the duplicate of this letter as acceptance and acknowledgement 30 days from the above date failing which our offer lapses.

Yours faithfully
For Kwong Yik Bank Berhad

Tan Kok Kwang
Assistant Manager
Task Group

[18] Based on the case of *Wee Tiang Teng*, *supra*, we are of the view that there was no evidence of any unequivocal admission of a subsisting debt by the respondent at the time of its acknowledgement. The appellant/plaintiffs contention that the said letter (exh. A7) constituted an acknowledgement of the outstanding debt by the respondent therefore fails.

A **When Did The Cause Of Action Accrue?**

[19] From the evidence available, the appellant gave overdraft facilities to the respondent by letter dated 28 December 1983. (Exhibit "A-I" – see Appeal Record Volume (2) p. 244). Thereafter by letter dated 6 February 1985 the appellant requested the respondent to regularise their overdrawn account by RM24,587.86 as at 5 February 1985 (exh. "A4" – see Appeal Record Volume (2) p. 253).

[20] In *Bian Chiang Bank Bhd v. Kwong Hing Cheong* [1978] 1 LNS 17; [1978] 2 MLJ 193, Chang Min Tat FJ said at p. 195 as follows:

> Not surprisingly therefore, the learned trial judge held that in the circumstances no demand for repayment was necessary to make the overdraft an enforceable debt, and that the overdraft became due and payable at the time when each loan was made. Time ran from that date: *Bradford Old Bank v. Sutcliffe and Parr's Banking Co. Ltd. V. Yates*.

[21] We therefore hold that the overdraft became due and payable at the time each loan was made. In the instant appeal, the respondent's overdraft therefore became due since 28 December 1983. This was further substantiated by the appellant's letter dated 6 February 1985 (exh. "A4") requesting the respondent to regularise its account failing which the appellants would have no alternative but to institute legal proceedings against the respondent to recover the whole outstanding balance of RM544,587.86 as at 5 February 1985. The appellant's course of action therefore arose since then.

[22] We are of the view that s. 26(2) of the Limitation Act 1953 does not apply in this case since there was no acknowledgement of the claim or any payment made in respect thereof by the respondent.

[23] By filing their claim only on 5 April 1996, we agree with the learned counsel for the respondent that the appellant's action was already statute barred by virtue of s. 6(1)(a) of the Limitation Act 1953.

[24] For the above reasons, we dismissed this appeal with costs.